Office - Supreme Court
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ALEXANDER L. STEVAS,
CLERK

No. 82-63.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,

Petitioner,

v.

MASSACHUSETTS GENERAL HOSPITAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

JOINT APPENDIX

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(617) 726-8624

IRA H. ZALEZNIK,
VALERIE L. PAWSON,
LAPPIN, ROSEN, GOLDBERG,
SLAVET, LEVENSON & WERSTEIN,
One Boston Place,
Boston, Massachusetts 02108.
(617) 437-1000

PETITION FOR CERTIORARI FILED JULY 12, 1982
CERTIORARI GRANTED OCTOBER 4, 1982

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Relevant Docket Entries.

Docket Entry No. 40942.

1980	*Filings — Proceedings*
March 26	Rem. from Municipal Court Boston.
	1. Complaint.
	3. Amended Complaint.
	11. ANSWER.
	12. Complaint of Third party 2 Cts.
May 16	20. Motion of plff. for Summary Judgment.
	21. Affidavit of Mass. General Hospital in support of Motion for Summary Judgment (2nd set).
May 23	21A. Aff. of Harold J. Randolph, Admitting Officer of Mass. General Hospital in support of mo. for summary judgment.
	21B. Aff. of Francis X. Sullivan, Director of Patients Accounts at Mass. General Hospital.
August 14	22. Agreed Statement of Facts.
1981	
February 20	23. Recommendation of Special Master re: Motion for summary judgment. Notice sent 2/27/81.
February 27	24. JUDGMENT (SUMMARY) (PURSUANT TO MASS. R. CIV. P. 56): Complaint of plaintiff is dismissed as to defend-

1981	*Filings — Proceedings*
February 27	
continued	ant City of Revere without costs AND: Complaint of 3rd party plaintiff is dismissed as to 3rd party defendants and approved, (Lynch J.), entered on Docket pursuant to Mass. R. Civ. P. 58(a) and notice sent to parties pursuant to Mass. R. Civ. P. 77(d).
March 4	25. Plff's. notice of appeal.
1982	
May 10	26. Rescript from Superior [*sic*] Court. ORDERED: "The judgment of the Superior Court is affirmed with respect to liability for Kivlin's second stay at the hospital. That portion of the judgment which concerns Kivlin's first stay at the hospital is reversed. The case is remanded to the Superior Court for the entry of judgment against Revere for charges stemming from Kivlin's first admission."
June 14	27A. Motion of deft. to stay Judgment, and allowed. (Linscott, J.)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. MUNICIPAL COURT OF THE CITY OF BOSTON
#470217

MASSACHUSETTS GENERAL HOSPITAL,
PLAINTIFF

vs.

CITY OF REVERE,
DEFENDANT

Complaint.

1. Plaintiff is a duly licensed hospital having a usual place of business at Fruit Street, Boston, County of Suffolk. Defendant is a municipal corporation having a usual place of business at City Hall, Revere, Massachusetts, 02151.

2. Defendant owes plaintiff $13,308.91 for professional services rendered by plaintiff to one Patrick Kivlin, an employee of the defendant, who was injured in the line of duty. Said employee of the defendant was treated at plaintiff's hospital from September 20, 1978 through September 29, 1978.

Wherefore plaintiff demands judgment against defendant for the sum of $13,308.91, interest from September 29, 1978 and costs.

LAURENCE S. WOLK
18 Tremont Street
Boston, MA 02108
523-1790
January 17, 1979

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. MUNICIPAL COURT OF THE CITY OF BOSTON
#470217

MASSACHUSETTS GENERAL HOSPITAL,
PLAINTIFF

vs.

CITY OF REVERE,
DEFENDANT

Amended Complaint as of Course.

The plaintiff, as of course, and in accordance with Rule 15(a) of the Massachusetts Rules of Civil Procedure, amends the complaint in this action so that the same will read as follows:

By striking paragraph 2 from the complaint, and substituting therefor the following:

"Defendant owes plaintiff $13,308.91 for professional services rendered by plaintiff to one Patrick Kivlin, who was in the care and custody of the defendant at the time of his admission to the plaintiff's hospital on September 20, 1978, and who remained a patient at the hospital until September 29, 1978."

This amendment is made as a matter of course in that the answer in the above-entitled action has not yet been served, nor have any motions been filed by the defendant.

LAURENCE S. WOLK
18 Tremont Street
Boston, MA 02108
523-1790
May 16, 1979

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS: BOSTON MUNICIPAL COURT
No: 470217

MASSACHUSETTS GENERAL HOSPITAL
PLAINTIFF

vs.

CITY OF REVERE
DEFENDANT

Defendant's Answer.

1. Defendant admits the allegations contained in paragraph one of the plaintiff's complaint.
2. Defendant denies the allegations contained in paragraph two of the plaintiff's complaint.

First Defense

Plaintiff's complaint fails to state a cause of action upon which relief can be granted.

Second Defense

The defendant states that the plaintiff never had a contract with the City and that if the plaintiff incurred expenses it did so prematurely and at its own risk.

By its attorneys,

LAPPIN, ROSEN, GOLDBERG,
SLAVET, LEVENSON & WEKSTEIN
By_____
VALERIE L. PAWSON
One Boston Place
Boston, MA 02108
Tel: 261-1000

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
#40942

MASSACHUSETTS GENERAL HOSPITAL,
PLAINTIFF

vs.

CITY OF REVERE,
DEFENDANT

Motion for Summary Judgment.

The plaintiff, pursuant to Rule 56 of Massachusetts Rules of Civil Procedure, moves the Court to enter summary judgment for the plaintiff on the ground that there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment as a matter of law.

In support of this motion, the plaintiff refers to the records herein including the complaint, the amendment to the complaint, the answer thereto, and the plaintiff's annexed affidavits.

LAURENCE S. WOLK
18 Tremont Street
Boston, MA 02108
523-1790

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT #40942

MASSACHUSETTS GENERAL HOSPITAL,
PLAINTIFF

vs.

CITY OF REVERE,
DEFENDANT

Affidavit of Massachusetts General Hospital in Support of its Motion for Summary Judgment (Second Set).

1. Massachusetts General Hospital is a legally licensed hospital;

2. I am the Director of Patients' Accounts of the Massachusetts General Hospital. According to the records kept under my control, the patient was admitted to the hospital on September 20, 1978, and discharged on the 29th day of September, 1978. A detailed invoice of the services rendered the patient is attached hereto and marked "A". This bill represents the fair value of the services rendered the patient by the plaintiff, and the rates thereof are set by the Rate Setting Commission of the Commonwealth of Massachusetts.

3. No payment has been made by or on behalf of the patient Patrick Kivlin.

According to the information supplied me by the admitting officer, said patient was under arrest by the Police of the City of Revere at the time he was brought to our hospital. The medical services rendered the patient were necessary, the charges were fair and the services were of an emergency

nature. He was in the custody of the Police of the City of Revere at the time he needed the medical attention.

This affidavit, made in support of the plaintiff's motion for summary judgment, is made under the pains and penalties of perjury this 16th day of May, 1980.

FRANCIS X. SULLIVAN
Director of Patients' Accounts
Massachusetts General Hospital

STATEMENT OF ACCOUNT

MASSACHUSETTS GENERAL HOSPITAL
Boston, Massachusetts 02114 TEL: 726-2154

Final 10/07/78 10/06
Inp.

ROOM NO.	HOSP.	ADMISSION DATE	DISCHARGE DATE
3 0612	03 1	09 20 78	09 29 78

KIVLIN PATRICK MR
CITY OF REVERE
POLICE DEPT
REVERE MA 02151

PATIENT NO. 1334693
PLEASE REFER TO THIS NUMBER ON ALL CORRESPONDENCE OR PAYMENTS.

PAGE 7 9

ADM THRU EW

PLEASE DETACH AND RETURN WITH REMITTANCE

POSTING DATE MONTH	DAY	CHARGE DESCRIPTION		TOTAL CHARGE	INSURANCE COVERAGE	CHARGE TO PATIENT
		SUMMARY OF ROOM AND SERVICE				
		WH 0806 5 days @ 189/day		945.00		945.00
		WH 0612 5 days @ 189/day		945.00		945.00
		SUMMARY OF PMNTS & CHARGES				
		A. OPERATING RM AND SERV	1	805.00		805.00
		B. ANESTHESIA	1	390.00		390.00
		C. RECOVERY RM	1	276.00		276.00
		D. PHARMACY	17	574.80		574.80
		E. RADIOLOGY	5	136.00		136.00
		F. LABORATORY	122	606.50		606.50
		G. MEDICAL, SURGICAL SUPP	4	24.50		24.50
		J. INHALATION THERAPY	1	7.00		7.00
		N. EW AND CLIN FEES	8	168.20		168.20
		S. ROOM AND SERVICE CORR	1	189.00CR		189.00CR
		T. BLOOD LAB.	24	3259.50		3259.50
				7948.50		7948.50

PLEASE PAY LAST AMOUNT THIS COLUMN 7948.50

[Itemized bill deleted.]

STATEMENT OF ACCOUNT

MASSACHUSETTS GENERAL HOSPITAL
Boston, Massachusetts 02114 TEL: 726-2154

Final 11/17/78 11/16
Inp.

ROOM NO.	HOSP.	ADMISSION DATE	DISCHARGE DATE
3 0617	03 2	10 27 78	11 10 78

MR PATRICK KIVLIN
NORTH SHORE RD
REVERE MA 02151

PATIENT NO. 1334693
PLEASE REFER TO THIS NUMBER ON ALL CORRESPONDENCE OR PAYMENTS.

PAGE 3 9

ADM THRU EW

PLEASE DETACH AND RETURN WITH REMITTANCE

POSTING DATE MONTH	DAY	CHARGE DESCRIPTION		TOTAL CHARGE	INSURANCE COVERAGE	CHARGE TO PATIENT
		SUMMARY OF ROOM AND SERVICE				
		WH 0106 1 DAYS @ 189/day		189.00		189.00
		WH 0604 2 days @ 189/day		378.00		378.00
		WH 0610 7 days @ 189/day		1323.00		1323.00
		WH 0617 4 days @ 189/day		756.00		756.00
		SUMMARY OF PMNTS & CHARGES				
		A. OPERATING RM AND SERV	1	1452.00		1452.00
		B. ANESTHESIA	1	644.00		644.00
		C. RECOVERY RM	1	75.00		75.00
		D. PHARMACY	15	324.11		324.11
		E. RADIOLOGY	1	30.00		30.00
		F. LABORATORY	14	117.50		117.50
		G. MEDICAL, SURGICAL SUPP	4	16.80		16.80
		T. BLOOD LAB.	2	55.00		55.00
				5360.41		5360.41

PLEASE PAY LAST AMOUNT THIS COLUMN 5360.41

[Itemized bill deleted.]

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT NO. 40942

MASSACHUSETTS GENERAL HOSPITAL,
PLAINTIFF

vs.

CITY OF REVERE,
DEFENDANT

Affidavit in Support of Motion for Summary Judgment.

1. I am an admitting officer of the Massachusetts General Hospital.

2. In the evening of September 20, 1978, one Patrick M. Kivlin was brought to the hospital in the care and custody of officers of the City of Revere Police Department for emergency treatment resulting from gunshot wounds in the abdomen. I admitted him at that time, was informed by the police of the City of Revere that he was under arrest, and notified the Massachusetts General Hospital Security Department of this fact.

3. After emergency treatment, Patrick M. Kivlin remained as an in-patient at the Massachusetts General Hospital.

This affidavit, made in support of the plaintiff's motion for summary judgment, is made under the pains and penalties of perjury this 1st day of February, 1980.

MASSACHUSETTS GENERAL HOSPITAL
By
HAROLD J. RANDOLPH
Admitting Officer

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT NO. 40942

MASSACHUSETTS GENERAL HOSPITAL,
PLAINTIFF

vs.

CITY OF REVERE,
DEFENDANT

Affidavit in Support of Motion for Summary Judgment.

1. Massachusetts General Hospital is a legally licensed hospital; the patient, Patrick M. Kivlin was admitted to the hospital on September 20, 1978 for gunshot wounds to his abdomen in the emergency department at night under the care and custody of the City of Revere Police Department;

2. I am the director of patients accounts of the Massachusetts General Hospital. According to the records kept under my control, the admission of the aforesaid patient occurred on September 20, 1978 for abdomen gunshot wounds. Patrick M. Kivlin was thereupon admitted as a in-patient, and discharged on November 8, 1978. The charges for his treatment and care were $7,948.50, which represents the fair value of the services rendered him by the plaintiff hospital.

This affidavit, made in support of the plaintiff's motion for summary judgment, is made under the pains and penalties of perjury this 1st day of February, 1980.

MASSACHUSETTS GENERAL HOSPITAL
By
FRANCIS X. SULLIVAN
Director of Patients Accounts

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT NO. 40942

MASSACHUSETTS GENERAL HOSPITAL
PLAINTIFF

vs.

CITY OF REVERE
DEFENDANT

Agreed Statement of Facts.

Now come the Massachusetts General Hospital and the City of Revere and hereby stipulate that the following facts be admitted for the purposes of this action only.

1) On September 20, 1978, officers of the Police Department of the City of Revere responded to 55 Hopkins Street in Revere in response to a reported breaking and entering in progress. Upon arriving at the scene they spotted a man, Patrick M. Kivlin, carrying a suitcase and a pillowcase. Patrick Kivlin attempted to run from the scene and was ordered to halt by police officers. Despite repeated warnings of "stop or I'll shoot" by the police and one warning shot, Kivlin did not halt. Kivlin was then shot by a police officer for the City of Revere.

2) The police summoned the Nordstrum Ambulance Service which arrived and took Patrick M. Kivlin to the Massachusetts General Hospital. One of the police officers for the City of Revere accompanied Kivlin in the ambulance to the Massachusetts General Hospital.

3) Patrick M. Kivlin was admitted to the Massachusetts General Hospital on September 20, 1978. A copy of the admission report is attached hereto and marked Exhibit "A".

4) Patrick M. Kivlin remained a patient at the Massachusetts General Hospital until September 29, 1978.

5) On September 26, 1978 the Chelsea District Court issued a warrant for the arrest for Patrick M. Kivlin on charges of breaking and entering in the night time, larceny, and common law conspiracy.

6) On September 29, 1978, Patrick M. Kivlin was discharged by the Massachusetts General Hospital into the custody of the Revere Police Department who took him from the hospital to the Chelsea District Court for a probable cause hearing. The judge granted a continuance to Kivlin and released him on personal recognizance.

7) The probable cause hearing on Patrick M. Kivlin was held on December 1, 1978 and probable cause was found. Patrick M. Kivlin voluntarily appeared at that hearing.

8) The City of Revere does not have any houses of correction or other jails within the City limits or under City control.

9) If the judge in the Chelsea District Court had not released Patrick Kivlin on personal recognizance and Kivlin had been unable to make bail he would have been sent to the Charles Street House of Correction or other similar house of correction by the Chelsea District Court.

10) On October 18, 1978 P. Kevin Foley, the manager of the Discharged Patients Accounts for Massachusetts General Hospital sent a final in-patient bill to the Chief of the Revere Police Department. A copy of this letter and bill is attached hereto and marked Exhibit "B".

11) On October 19, 1978 the Chief of Police for the City of Revere responded to Mr. Foley's letter that the City of Revere had no provision for payment of the bill. A copy of this letter is attached hereto and marked Exhibit "C".

12) Attached hereto and marked Exhibit "D" is a true and accurate copy of the Revere Rev. Ord. Section 15-3.

By their attorneys,

LAURENCE S. WOLK, ESQ.
Attorney for Massachusetts General Hospital
18 Tremont Street
Boston, MA 02108
Tel: 523-1790

VALERIE L. PAWSON, ESQ.
Attorney for the City of Revere
LAPPIN, ROSEN, GOLDBERG, SLAVET, LEVENSON & WEKSTEIN
One Boston Place
Boston, MA 02108
Tel: 261-1000

Exhibit "A" deleted. See page 9.
Exhibit "B" deleted. See page 10.
Exhibit C and D deleted.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT
No. 40942

MASSACHUSETTS GENERAL HOSPITAL,
PLAINTIFF

v.

CITY OF REVERE,
DEFENDANT, AND THIRD PARTY PLAINTIFF

v.

COMMONWEALTH OF MASSACHUSETTS,
THIRD PARTY DEFENDANT

Recommendation of the Special Master.

This matter came on to be heard before me pursuant to an order of the Court appointing me Special Master to hear motions for summary judgment on undisputed facts under Rule 56 of the Massachusetts Rules of Civil Procedure.

After a hearing before me and after a review of the pleadings and other data/material of record on file I conclude, pursuant to Rule 56, that there are no issues of material fact in dispute and that the plaintiff is not entitled to prevail. I conclude pursuant to Rule 56 that the defendant City of Revere is entitled to prevail as a matter of law.

In this action the plaintiff hospital seeks $13,308.91 from the defendant, City of Revere, for services it rendered to a pa-

tient, Patrick M. Kivlin. It is admitted[1] that Revere police officers on September 20, 1978, responded to a reported breaking and entering in progress in their city; that they discovered Mr. Kivlin, with a suitcase and pillowcase, at the scene; that he sought to flee; that repeated warnings of "stop or I'll shoot" were given and that a Revere police officer did shoot Mr. Kivlin. The police summonsed an ambulance service which took Kivlin to the plaintiff hospital. Mr. Kivlin was accompanied by a Revere police officer. Kivlin was a patient at the hospital until September 29, 1978. An arrest warrant was issued in the Chelsea District Court on September 26, 1978. Upon his discharge Kivlin was taken to that Court for a probable cause hearing. The matter was continued and Kivlin released on personal recognizance. The hearing was held on December 1, 1978, and probable cause was found. The City of Revere has no houses of correction or other jails within its limits or in its control.[2] On October 18, 1978, the plaintiff sent a final inpatient bill for $7948.50 to the Chief of the Revere Police Department who on October 19, 1978, responded that the City of Revere had no provision for payment of the bill.[3]

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[1] Docket File No. 22, Agreed Statement of Facts *filed August 14, 1980*, subsequent to the June 30, 1980, hearing date before the Special Master. But see also undocketed agreed Statement of Facts, dated July 17, 1980, which is identical; see exhibits attached thereto (hospital admission. . . .) See: affidavit of Harold J. Randolph, M.G.H. admitting officer, Undocketed; See also Docket File No. 21, affidavit of Francis X. Sullivan, Director of Patient Accounts.

[2] Had Kivlin not been granted personal recognizance he would have been sent by the Court to the Charles Street, House of Correction or other similar house of correction.

[3] It appears that Kivlin was also re-admitted to the MGH on October 27, 1978, and discharged on Nov. 10, 1978. The $5360.41 is the difference between $13,308.91 and $7948.50. See undocketed Statement of Agreed Facts dated July 17, 1980, and attached exhibits. See also City of Revere legal memorandum, pg. 1.

The plaintiff seeks to recover from the defendant City alleging that the said Kivlin was in the City's "care and custody" at the time of the September 20, 1978, hospital admission and is therefor liable for all of the services rendered in connection with both the September admission and the October admission. See: *Lutheran Medical Center* v. *City of Omaha*, 204 Neb. 292 (1979). I note that in the latter case the defendant city operated its own jail which is not true in the instant case. The plaintiff argues that the arresting authority has a "legal obligation to supply medical services" and should be held liable to pay the hospital which supplied such.

I conclude that under the law of this Commonwealth the City of Revere is not liable for either the initial in patient hospital bill of $7948.50 or the second in patient hospital bill of $5360.41. No evidence exists on this record as to any of the circumstances which surround Mr. Kivlin's re-admission to the hospital in October, 1978. Clearly a City and/or its agents cannot be intentionally indifferent to the medical needs of a prisoner. See: *Estelle* v. *Gamble*, 429 U.S. 97 (1976). But such is not to say that the City of Revere is obligated to provide the funding for such emergency medical services rendered to the suspect, in the absence of a statute or other law granting authority to the City to contract for such or mandating such funding. For a similar fact pattern elsewhere which denied liability see: *Windham Comm. Hosp.* v. *City of Willimantic*, 348 A.2d 651, 656-658 (Conn. 1974). See also: *Trinity Hosp. Assn.* v. *City of Minot*, 76 N.W.2d 916, 923 (N.D. 1956).

No statute or ordinance exists which would authorize the plaintiff, on our record to recover payment for such services. See: G. L. (Ter. Ed.) c. 43, s. 29 which expressly requires that the Mayor of the City *and* the appropriate department head must sign any contract before it is enforceable against the City. The municipal ordinances of the City of Revere expressly prohibit employees of the City from making contracts,

which directly or indirectly, would bind the City. Such contracts are voidable at the election of the City. See: Revere Rev. Ords. s. 2.1. The Chief of Police has no express duty to provide care for prisoners held in the department's custody. See: Revere Rev. Ord. s. 15.3.

Plaintiffs dealing with a municipality are required to take notice of the limitations imposed upon the municipality's contracting power. See: *Morse* v. *Boston*, 253 Mass. 247, 252-3 (1925); *Fluet* v. *McCabe*, 299 Mass. 173, 178 (1938). *Quincy* v. *Brooks-Skinner, Inc.*, 325 Mass. 406, 412-13 (1950). This is true whether the plaintiff's claim is based on an express contract, an implied in fact contract or an implied in law contract. See also: *Adolian Bros. Inc.* v. *Boston*, 323 Mass. 629, 631-2 (1949).

In *Adams* v. *Wiscosset*, 5 Mass. 328, 329 (1809) our Court held the Commonwealth of Massachusetts liable for hospital expenses incurred by a suspect. The opinion was based on St. 1794, c. 48 which imposed such liability on the Commonwealth. The fact that this statute was repealed does not permit us to conclude that now our City is to be liable. Without a statutory enactment expressly covering this issue, it can reasonably be concluded that the General Court either decided, in its collective wisdom, to abolish such liability or that it was best covered by a series of other enactments. See: G.L. (Ter. Ed.) c. 276, s. 58 (transporting prisoners, expenses); G.L. (Ter. Ed.) c. 127, s. 117 (jail physician certifying prisoner needs medical services not available in jail); G.L. (Ter. Ed.) c. 126, s. 29 (Auditor of Boston pays expenses to keep and maintain prisoners who committed crimes in that city).

I further conclude there is no obligation imposed by our constitution or that of the United States Constitution which requires the City to appropriate moneys to pay for such medical services rendered by the plaintiff. Cf. *Harris* v. *McRae*, 48 U.S. L.W. 4941 (1980) (abortion operation funding).

For the foregoing reasons, I recommend that the motion of the plaintiff for summary judgment not be granted. I further recommend that the Court should grant summary judgment for the defendant City of Revere.

Respectfully submitted,

BRIAN T. CALLAHAN
Special Master

Dated: February 12, 1981

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, APRIL 12, 1982.

IN THE CASE No. SJC-2579

MASSACHUSETTS GENERAL HOSPITAL

vs.

CITY OF REVERE

pending in the Superior Court Department of the Trial Court for the County of Suffolk No. 40942

ORDERED, that the following entry be made in the docket; viz., —

The judgment of the Superior Court is affirmed with respect to liability for Kivlin's second stay at the hospital. That portion of the judgment which concerns Kivlin's first stay at the hospital is reversed. The case is remanded to the Superior Court for the entry of judgment against Revere for charges stemming from Kivlin's first admission.

BY THE COURT,

PATRICK J. HURLEY, CLERK.

April 12, 1982.

See opinion on file.

MASSACHUSETTS GENERAL HOSPITAL vs. CITY OF REVERE.

Suffolk. December 11, 1981. — April 12, 1982.

Present: HENNESSEY, C.J., LIACOS, NOLAN, LYNCH, & O'CONNOR, JJ.

Municipal Corporations, Contracts. *Contract*, With municipality. *Hospital. Police. Arrested Person. Imprisonment. Constitutional Law*, Cruel and unusual punishments.

No statutory or common law basis existed for a municipality to contract with a hospital for the care and treatment of a suspect shot while attempting to evade police. [ ]

A hospital which furnished care and treatment to a suspect shot while attempting to evade municipal police officers was not entitled to recover from the municipality the value of its services on the theory of quantum meruit. [ ]

The prohibition against deliberate indifference to the medical needs of prisoners, contained implicitly in the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution, established the liability of a municipality to the hospital which furnished care and treatment to a suspect who was shot while trying to evade municipal police officers and who was in their custody at the time of his admission to the hospital. [ ]

CIVIL ACTION commenced in the Boston Municipal Court Department on March 18, 1980.

On removal to the Superior Court Department the case was heard by *Lynch*, J., on a motion for summary judgment.

After review was sought in the Appeals Court the Supreme Judicial Court ordered direct appellate review on its own initiative.

Laurence S. Wolk for Massachusetts General Hospital.

Ira H. Zaleznik for the city of Revere (*Valerie L. Pawson* for the city of Revere and *Carl Valvo*, Assistant Attorney General, for the Commonwealth, with him).

NOLAN, J. On September 20, 1978, city of Revere police responded to a reported breaking and entering in progress.

Upon arrival at the scene, they observed Patrick M. Kivlin with a suitcase and a pillowcase. Kivlin fled and, after repeated warnings to stop and one warning shot, was shot by a police officer. The police summoned an ambulance, which took Kivlin, accompanied by a police officer, to Massachusetts General Hospital (hospital). Kivlin was admitted and remained a patient at the hospital until September 29, 1978.

On September 26, 1978, a warrant issued in the Chelsea Division of the District Court Department for Kivlin's arrest on charges of breaking and entering in the nighttime, larceny, and conspiracy. On September 29, 1978, Kivlin was discharged by the hospital[1] into the custody of the Revere police department and was taken by the police to the Chelsea District Court for a probable cause hearing. The judge granted a continuance to Kivlin[2] and released him on personal recognizance.[3] On October 27, 1978, prior to the probable cause hearing, Kivlin returned to the hospital for treatment, including surgery.[4] He was released on November 10, 1978.[5] A bill for Kivlin's first admission at the hospital was sent to the Revere police department. The chief of police of Revere, responding to the request for payment, stated in a letter to the hospital that Revere had no provision for payment of the bill.

The hospital commenced this action against Revere seeking to recover the full cost of the medical services rendered

[1] During this period, the bill for services rendered to Kivlin at the hospital was $7,948.50.

[2] Probable cause was found at a hearing on December 1, 1978.

[3] The parties stipulated that if the judge had not released Kivlin on personal recognizance and Kivlin had been unable to make bail, he would have been sent by the Chelsea District Court to the "Charles Street House of Correction" or a similar house of correction. See Mass. R. Crim. P. 7 (a) (1), 378 Mass. 855 (1979).

[4] Nowhere in the record is it stated in what circumstances or for what medical problems Kivlin was readmitted to the hospital.

[5] The bill for services rendered to Kivlin at the hospital during this period was $5,380.41.

to Kivlin during both stays at the hospital. Revere answered and filed a third-party complaint against Kivlin and the Commonwealth for reimbursement. The hospital moved for summary judgment, and the case was referred to a special master. Thereafter, upon the master's recommendation, a Superior Court judge denied the hospital's motion for summary judgment, dismissed the complaint and third-party complaint, and entered judgment in favor of Revere. Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974). The hospital appealed, and we transferred the case to this court on our own motion.

The hospital claims, both on contractual and constitutional grounds, that Revere is obligated to pay for the necessary medical services provided to Kivlin. While there is no contractual basis for recovery, we hold that the constitutional prohibition against cruel and unusual punishment, embodied in the Eighth Amendment to the United States Constitution, requires that Revere be liable to the hospital for the medical services rendered to Kivlin during his first stay at the hospital, but not during his second stay.

1. *Contract.* The hospital contends, first, that some kind of implied contract between the hospital and Revere was concluded when the police brought Kivlin to the hospital and he was admitted for treatment. We disagree.

Several prerequisites must be in place before a municipality can be said to have entered into a valid contract. First among these is an underlying authority in the municipality to make the contract. *Lord* v. *Winchester*, 355 Mass. 788, 789 (1969). We have found no basis, either statutory or in common law, that gives to Revere the authority to contract with a hospital for the care and treatment of a suspect shot while attempting to evade police. Municipalities are given the power to contract for health services, G. L. c. 40, § 4, but those contracts may be entered into only by a board of health or a "legally constituted board performing the powers and duties of a board of health." G. L. c. 40, § 4, sixth par., inserted by St. 1965, c. 874, § 3. Here, the hospital sent its bill to the Revere police department, an agency

not performing the powers and duties of a board of health. The hospital, admitting that there are no statutes authorizing its purported contract with Revere, looks hopefully to the common law for authority. There is no such authority. There can be no contract with Revere unless statutory requirements are fulfilled. See *Urban Transp., Inc.* v. *Mayor of Boston*, 373 Mass. 693, 696 (1977); *Richard D. Kimball Co.* v. *Medford*, 340 Mass. 727, 729 (1960).

In addition to the necessity for an underlying authority for a municipality to contract, any contract made on behalf of a city must be made by a duly authorized agent. *Lord* v. *Winchester, supra*. The powers of police officers are delineated in detail in G. L. c. 41, § 98. Nowhere in § 98 is the power to contract given to police. They do not have such power, and are not, therefore, a duly authorized agent of a city to contract.

Furthermore, even if the police had the authority to contract, several statutory requirements for a valid contract were not met. All contracts made by city departments in excess of $2,000 must be in writing and approved by the mayor. G. L. c. 43, § 29. Except in an emergency, a city department could not incur liabilities in excess of its appropriation. G. L. c. 44, § 31. In an emergency, arguably the case here, the city council must approve the expenditure. G. L. c. 44, § 31. "Persons dealing with a municipality must take notice of limitations of this kind upon the contracting power of the municipality and are bound by them and cannot recover upon contracts attempted to be made in violation of them." *Duff* v. *Southbridge*, 325 Mass. 224, 228 (1950), quoting from *Adalian Bros.* v. *Boston*, 323 Mass. 629, 631 (1949). See also *Quincy* v. *Brooks-Skinner, Inc.*, 325 Mass. 406, 413 (1950); *Fluet* v. *McCabe*, 299 Mass. 173, 178 (1938); *Morse* v. *Boston*, 253 Mass. 247, 252 (1925). That the city may have benefited by the hospital's actions is irrelevant to this issue. The statutes are controlling. *Fluet* v. *McCabe, supra*. There is no basis sounding in contract for recovery in this case. See *Windham Community Memorial Hosp.* v. *Willimantic*, 166 Conn. 113

(1974); *Trinity Hosp. Ass'n* v. *Minot*, 76 N.W.2d 916 (N.D. 1956).

The hospital is in no better position on a theory of quantum meruit. Where a contract is illegal by reason of failure to comply with statutory requisites, we will not allow recovery based on quantum meruit. *Lowell* v. *Massachusetts Bonding & Ins. Co.*, 313 Mass. 257, 272 (1943). To do otherwise would, in effect, nullify the statutory scheme with respect to contracts with municipalities. *McGovern* v. *Boston*, 229 Mass. 394, 397-398 (1918). See 15 S.Williston, Contracts § 1786A, at 343-344 (3d ed. 1972). The case of *Long* v. *Athol*, 196 Mass. 497 (1907), is not to the contrary. In *Long* there was a valid contract set aside by the court because of mutual mistake as to the estimate of the amount of work to be done. There the municipality was held liable in quantum meruit for services rendered under what was, at the time the services were rendered, a legal contract. In the instant case no contract was ever executed. Mistake, even if mutual, as to the authority or power of a municipality to contract, is not the type of mistake which will allow recovery in quantum meruit. A good faith rendering of services in such a situation does not warrant violation of the statutory arrangement. *Fluet* v. *McCabe*, *supra* at 178.

2. *Eighth Amendment.* The hospital argues that the prohibition against deliberate indifference to the medical needs of prisoners contained implicitly in the Eighth Amendment[6], *Estelle* v. *Gamble*, 429 U.S. 97 (1976), compels a government agency or division responsible for supplying those medical needs to pay for them.[7] We agree. Kivlin

[6]The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment has been made applicable to the States by the Fourteenth Amendment. See *Robinson* v. *California*, 370 U.S. 660 (1962). The plaintiff does not invoke the Massachusetts Constitution, though art. 26 of the Declaration of Rights contains a prohibition against the infliction of "cruel or unusual punishments."

[7]We recognize that there may be a question as to the hospital's standing to raise a claim under the Eighth Amendment in this context. No such question was raised or argued in the briefs before us. As such, we deem

was a prisoner in the custody of the Revere police during his first stay in the hospital from September 20 to September 29. We rule that Revere is liable for the expenses of this confinement. Kivlin was not in the custody of the Revere police when he readmitted himself on October 27, however. Accordingly, we find Revere liable only for Kivlin's first confinement.

Revere cites *Estelle* v. *Gamble, supra*, for the proposition that a government's obligation to refrain from deliberate indifference to the serious medical needs of a prisoner is limited to those "whom it is punishing by incarceration." *Id.* at 103. Since Kivlin had not been incarcerated when he was brought to the hospital, continues Revere, the rule of *Estelle* v. *Gamble, supra*, does not apply. It is not the fact of incarceration, however, that triggers the protections afforded by the Eighth Amendment. Rather, it is the suspect's loss of freedom when he "cannot by reason of the deprivation of his liberty, care for himself," *id.* at 104, quoting from *Spicer* v. *Williamson*, 191 N.C. 487, 490 (1926), that requires the government to begin to provide medical care. Cf. *Dodge City Medical Center* v. *Board of County Comm'rs in Gray County*, 6 Kan.App.2d 731 (1981) (where a suspect is apprehended in the commission of a felony, felled by a police bullet, and taken to a hospital for treatment, he is "in custody" for the purpose of determining the government's liability for his medical expenses while hospitalized, even if he is not formally arrested or kept under guard). See *Lutheran Medical Center of Omaha, Neb.* v. *Omaha*, 204 Neb. 292, 297 (1979); *Ramsey* v. *Ciccone*, 310 F. Supp. 600, 605 (W.D. Mo. 1970).

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the issue waived. Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 919 (1975).

Furthermore, standing to litigate constitutional issues is sometimes granted to persons asserting the rights of others, especially when it would be difficult for the person whose rights are asserted to litigate them. See C.A. Wright, Law of Federal Courts 50-51 (3d ed. 1976). Cf. *Barrows* v. *Jackson*, 346 U.S. 249 (1953) (party allowed to assert constitutional rights of third persons who, in the future, would find it more difficult to buy property if party not allowed to litigate constitutional issue).

Revere proposes that until September 26, when a warrant for his arrest issued, Kivlin was not under arrest and had, therefore, not lost his freedom so as to bring into play the Eighth Amendment. This argument is specious.

Kivlin was shot by police after repeated warnings to stop, at a time when he was purportedly engaged in committing a felony. Courts have delineated three elements that should be examined in determining when a person is placed under arrest. To constitute an arrest, "'[1] there must be an actual or constructive seizure or detention of the person, [2] performed with the intention to effect an arrest and [3] so understood by the person detained.' . . . '[T]he test must be not what the defendant [. . .] thought, but what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes.'"[8] *Hicks* v. *United States*, 382 F.2d 158, 161 (D.C. Cir. 1967), quoting from *Jenkins* v. *United States*, 113 F.2d 99, 101 (10th Cir. 1947), and *United States* v. *McKeehan*, 247 F. Supp. 324, 328 (D.D.C. 1965). See also *Commonwealth* v. *Meehan*, 377 Mass. 552, 558-559 (1979), cert. dismissed as improvidently granted, 445 U.S. 39 (1980); *Commonwealth* v. *Avery*, 365 Mass. 59, 65 (1974).

We need not determine at exactly what point the police effectuated an arrest of Kivlin. Certainly at the time the police bullet entered his body he was under arrest. He was intentionally seized by the police at that moment and a reasonable person could only believe that he was then under arrest.

Kivlin was brought to the hospital as a prisoner. Revere had a legal duty to supply him with necessary medical care.[9]

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[8]This test was established in the context of the Fourth and Fifth Amendments to the United States Constitution. The essence of police custody necessary to raise the Eighth Amendment right to be free of cruel and unusual punishment cannot be less stringent than the circumstances necessary to establish custody under the Fourth or Fifth Amendments.

[9]Further, had Kivlin refused the proffered care, he could have been compelled to submit to treatment. *Commissioner of Correction* v. *Myers*, Mass. Adv. Sh. (1979) 2523.

Estelle v. *Gamble*, 429 U.S. 97 (1976). To ensure Kivlin's right to medical care, Revere must be held liable to the hospital for the medical services it rendered. See *Lutheran Medical Center of Omaha, Neb.* v. *Omaha*, *supra*; *Dade County* v. *Hospital Affiliates Int'l, Inc.*, 378 So. 2d 43 (Fla. Dist. Ct. App. 1979) (dictum that government is assumed liable to a hospital which renders medical services to its prisoners). That funds may not have been appropriated for this purpose is no excuse, because inadequate funding will not excuse deprivation of rights guaranteed by the Constitution. *Blaney* v. *Commissioner of Correction*, 374 Mass. 337, 342 n.3 (1978). See *Smith* v. *Sullivan*, 611 F.2d 1039, 1043-1044 (5th Cir. 1980); *Williams* v. *Edwards*, 547 F.2d 1206, 1212-1213 (5th Cir. 1977); *Finney* v. *Arkansas Bd. of Correction*, 505 F.2d 194, 201 (8th Cir. 1974). Further, that such payment may be a violation of State or local law will not avail Revere of any relief from the payment. *Smith* v. *Sullivan*, *supra*.

Reflective of the discussion above, we hold that Revere is liable to the hospital for the stipulated charges incurred for Kivlin's initial stay in the hospital, from September 20, 1978, to September 29, 1978. Entry of summary judgment for Revere with respect to payment for Kivlin's first stay in the hospital was error. On the pleadings and stipulations before us, partial summary judgment should have been entered for the hospital. Mass. R. Civ. P. 56 (a), 365 Mass. 824 (1974).[10]

Kivlin's second stay in the hospital, from October 27, 1978, to November 10, 1978, represents a different situation. The rationale supporting the government's responsibility for the medical needs of its prisoners is that, being in custody, the prisoners cannot provide for these needs themselves. *Estelle* v. *Gamble*, *supra* at 104. "Confinement

[10] The result that we reach under the constitutional banner is entirely consistent with the legislative policy toward prisoners. See G. L. c. 127, § 32 (prisoners are to be treated with "kindness"); G. L. c. 127, § 90A (release of prisoners requiring treatment in medical facilities); G. L. c. 127, § 117A.

strips prisoners of the ability to provide themselves with the basic necessities for living. Thus, the constitution places a duty on prison officials to maintain the well-being of inmates. The duty extends to those needs which the prisoners are unable to provide *because* of their confinement" (emphasis added). *Tunstall* v. *Rowe*, 478 F. Supp. 87, 89 (N.D. Ill. 1979). See *Spicer* v. *Williamson*, *supra* at 490. Once Kivlin was released on personal recognizance, on September 29, he was no longer in the custody of the Revere police or of any other authority. See *Opinion of the Justices*, 201 Mass. 609, 611 (1909) ("the acceptance of bail while a prosecution is pending is a waiver of the right of the State, for the time being, to insist upon the custody of the person of the accused"). That Kivlin was under an obligation to return to court did not place him in the custody of anyone. He was under no greater restriction than one who had been subpoenaed to testify in court as a witness. It was Revere's custody of his body that established his right to medical treatment here. See *Ramsey* v. *Ciccone*, 310 F. Supp. 600 (W.D. Mo. 1970).[11] For this reason, summary judgment was correctly entered for Revere with respect to payment for Kivlin's second stay in the hospital.

The judgment of the Superior Court is affirmed with respect to liability for Kivlin's second stay at the hospital. We reverse that portion of the judgment which concerns Kivlin's first stay at the hospital. The case is remanded to the Superior Court for the entry of judgment against Revere for charges stemming from Kivlin's first admission.

So ordered.

[11] We recognize that a person released on bail or on his own recognizance is considered "in custody" within the meaning of 28 U.S.C. § 2241 (1976), with respect to the jurisdiction of a Federal court to rule on a petition for habeas corpus. *Thames* v. *Justices of the Superior Court*, 383 F. Supp. 41, 43 (D. Mass. 1974). That a person is "in custody" for one purpose does not make him "in custody" for all purposes. The logic of the Eighth Amendment proscription of indifference to serious medical needs of prisoners extends only to those in physical custody.